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Supreme Court, U.S.
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No. 95-486

In The

Supreme Court of the United States

October Term, 1995

HERBERT LITTLES,

Petitioner,

v.

JEFFERSON SMURFIT CORPORATION (U.S.),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Eleventh Circuit correctly affirm the verdict of a racially diverse jury that Respondent Jefferson Smurfit Corporation (U.S.) did not intentionally discriminate against Petitioner Herbert Littles in violation of 42 U.S.C. §§ 1981 or 1982 when it declined to enter into a supplier contract with Littles?

PARTIES

The parties are:

Petitioner: Herbert Littles

Respondent: Jefferson Smurfit Corporation (U.S.) (hereinafter referred to as "JSC"), a Delaware corporation.[1]

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[1] *Rule 29.1 Listing:* Subsequent to the commencement of this action, the named defendant, Container Corporation of America, was merged into JSC. JSC is a wholly-owned subsidiary of JSCE, Inc., a Delaware corporation and wholly-owned subsidiary of Jefferson Smurfit Corporation, a Delaware corporation that is publicly traded. JSC's subsidiaries, other than wholly-owned subsidiaries, are Smurfit Newsprint Corporation, a Delaware corporation; Groveton Paper Board, Inc., a New Hampshire corporation; and Dalton Paper Products, Inc., a Georgia corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

I. JSC USES A DEALERSHIP SYSTEM TO ACQUIRE PULPWOOD AND DOES NOT CONTRACT DIRECTLY WITH WOOD PRODUCERS LIKE LITTLES 2

A. How the Dealership System Operates ... 2

B. JSC's Business Reasons for Relying on the Dealership System 4

C. JSC Makes Supplier Contracts Only with Firms Already in Business as Dealers 5

D. JSC's Policy of Limiting Contracts to Suppliers Already in Business as Dealers Has an Equal Impact on Blacks and Whites .. 6

E. Littles Is Not a Wood Dealer 7

F. JSC's "Dealers Only" Policy Does Not Prevent Littles from Going into Business as a Dealer 8

II. JSC HAS NOT CONTRACTED WITH ANY BUSINESS THAT IS SIMILARLY SITUATED TO LITTLES' BUSINESS 9

SUMMARY OF ARGUMENT 12

ARGUMENT 14

TABLE OF CONTENTS – Continued

Page

I. THE DECISIONS BELOW WERE CONSISTENT WITH AND COMPELLED BY APPLICABLE LAW 14

A. Littles Failed Even to Establish a Prima Facie Case of Intentional Discrimination 15

B. JSC's Standards for the Selection of Its Wood Dealers Are Legitimate and Nondiscriminatory 16

C. JSC's Reasons For Not Contracting with Littles Are Not Pretexts For Discrimination 16

II. THE ELEVENTH CIRCUIT'S DECISION RAISES NO ISSUE THAT WARRANTS REVIEW BY THIS COURT 17

A. Littles Did Not Proffer Any Evidence of Historical Discrimination by JSC in the Making of Supplier Contracts 17

B. Littles' New Argument That JSC Relies on a "Grandfather Clause" Is Not Supported by the Evidence Presented or Proffered at Trial 19

C. The Settlement of Employment Discrimination Lawsuits Against Separate Corporate Divisions of JSC Are Irrelevant to Littles' Claim of Contractual Discrimination by JSC's Woodlands Division 20

D. The District Court's Rulings With Respect to Littles' "Evidence" of Discrimination in the Pulp and Paper Industry as a Whole Were Within the Court's Discretion 23

TABLE OF CONTENTS – Continued

Page

E. This Case Presents No Conflict with Decisions of this Court or of Other Circuits.. 24

F. The Fourteenth and Fifteenth Amendment Cases Cited by Littles Are Irrelevant to this Lawsuit 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989) 15

Bazemore v. Friday, 478 U.S. 385 (1986) ... 22, 25, 26, 27

Beavers v. American Cast Iron Pipe Co., 975 F.2d 792 (11th Cir. 1992) 26

Brown v. American Honda Motor Co., 939 F.2d 946 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992) 15, 16, 17, 25

Cannon v. Teamsters & Chauffeurs Union, 667 F.2d 173 (7th Cir. 1981) 17

City of Richmond v. Croson, 488 U.S. 469 (1989) 28

Crawford v. Western Electric Co., 745 F.2d 1373 (11th Cir. 1984) 15

Delaware State College v. Ricks, 449 U.S. 250 (1980) 22

Forsberg v. Pacific Northwest Bell Telephone Co., 840 F.2d 1409 (9th Cir. 1988), *cert. denied*, 502 U.S. 1058 (1992) 25

General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982) 15, 24

Giles v. Ireland, 742 F.2d 1366 (11th Cir. 1984) 17

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 25

Guinn v. United States, 238 U.S. 347 (1915) 20

Harpring v. Continental Oil Co., 628 F.2d 406 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981) 22

Harrison v. Container Corp. of America, Civ. No. 90-T-016-N (M.D. Ala. 1990) 20, 21

Hazelwood School District v. United States, 433 U.S. 299 (1977) 22, 28

TABLE OF AUTHORITIES – Continued

Page

Houston v. Benttree, Ltd., 637 F.2d 739 (10th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981)..... 15

Mayor v. Educational Equality League, 415 U.S. 605 (1974)..... 27

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)..... 15, 16, 25

Meyers v. Ford Motor Co., 659 F.2d 91 (8th Cir. 1981)..... 15, 20

Mitchell v. Jefferson County Board of Education, 936 F.2d 539 (11th Cir. 1991)..... 26

Myers v. Anderson, 238 U.S. 368 (1915) 20

Patterson v. McLean Credit Union, 491 U.S. 164 (1989)..... 15, 16

Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994)..... 28

Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563 (7th Cir. 1989)..... 15

Suggs v. Container Corp. of America, Civ. No. 7058-72-P (S.D. Ala. 1974) 20, 21, 22

Teamsters v. United States, 431 U.S. 324 (1977)..... 20

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 16

Webb v. Indiana National Bank, 931 F.2d 434 (7th Cir. 1991) 26

Zaklama v. Mount Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988), *cert. denied*, 502 U.S. 1058 (1992) 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1982 ..... 1, 13, 14, 15, 24, 27

Fed. R. Evid. 401 21

Fed. R. Evid. 403 21

Fed. R. Evid. 408 21

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

A racially diverse jury found, after a week of trial, that JSC's Brewton Woodlands Division did not intentionally discriminate against Littles on the basis of race when JSC declined to enter into a supplier contract with him. [App. at 42a-43a] The jury reached this verdict after thorough instruction by the trial court regarding the law applicable under 42 U.S.C. §§ 1981 and 1982.[2] The United States District Court for the Southern District of Alabama denied Littles' post-verdict motions and entered judgment for JSC. [*Id.* at 44a-47a]

On appeal, the United States Court of Appeals for the Eleventh Circuit Court held *per curiam* that Littles' appeal of the denial of his motion for judgment as a matter of law was frivolous, "given the evidentiary record in this case." [*Id.* at 2a] The Eleventh Circuit also rejected Littles' arguments that the district court had abused its discretion in excluding evidence proffered by Littles, and affirmed the district court's denial of Littles' motion for a new trial. [*Id.*]

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[2] Although Littles states that the district court rejected instructions proffered by Littles that would have permitted the jury to consider Littles' claims of "perpetuation of past discrimination," Littles does not identify what instructions he proffered that would have supposedly accomplished this purpose. [Petition at 8] Furthermore, Littles made no objection at trial with respect to any such purported jury instruction, and thus did not preserve any such alleged issue for appeal.

STATEMENT OF THE CASE

I. JSC USES A DEALERSHIP SYSTEM TO ACQUIRE PULPWOOD AND DOES NOT CONTRACT DIRECTLY WITH WOOD PRODUCERS LIKE LITTLES.

A. How the Dealership System Operates

JSC's Brewton Woodlands Division must consistently supply JSC's Brewton Mill, a separate division of JSC, with approximately 2,000 cords (300 to 400 loads) of pulpwood per day, as necessary for the Mill to produce paper products. [R.6. 447-51, 530]

In order to meet its pulpwood needs, JSC Woodlands contracts with suppliers or "dealers," who function as wholesalers, for wood that the dealer sells. The dealer, in turn, contracts with "producers" who, like retailers, either sell wood they have purchased to the dealer or who cut and haul timber the dealer has purchased. Most wood dealers have subcontracts with a number of producer crews that usually work for a single dealer. A typical producer, like Littles, operates with a single four- to nine-man crew. [R.5. 240-41, 262; R.6. 663, 713, 731, 737, 836, 843-44]

Contrary to Littles' characterization, "producers" do not become "dealers" simply by virtue of their designation as such by a paper mill. [Petition at 3, 6] Instead, dealers and producers perform two fundamentally different functions in the supply chain. Producers' essential function is cutting down trees and delivering wood as subcontractors to dealers. Dealers act as "middlemen" for

the goods and services of others, and their essential function is brokering the purchase and sale of the wood that is harvested by producers. In addition, dealers' activities include the building of logging roads, bridges, and culverts; financing equipment and timber purchases for producers; acquiring and marketing timber; coordinating and supervising the logging done by producers under subcontract; coordinating delivery to buyers; and maintaining inventory either as standing timber that the dealer has already purchased and is ready to be cut or timber that has been cut and is stored in woodyards that are owned or leased by the dealer. [R.6. 458-60, 476-77, 495-98, 818-20]

Furthermore, the business character of the operations of dealers is fundamentally different from that of producers. Dealers are independent, competitive businesses that contract with several different paper companies at the same time. A dealer's ability to attract a number of customers insures that the dealer will have other outlets for its wood if, for example, one of the mills with which the dealer contracts closes or temporarily limits its wood consumption during repairs or maintenance. [R.6. 774]

The operation of a dealership requires considerably more capital than running a production crew. Hundreds of thousands of dollars can be put at risk in a single transaction, and no return can be expected on such an investment for months or years. [R.6. 460, 477, 694, 767] In contrast, the producer gets paid as the producer's work is done, carries no "float," and takes no market risk if, as is usual, the producer is paid a predetermined price for each cord of wood he produces. [R.6. 477-78] Dealers

generally pay their producers at the end of each week, or as the producer delivers wood to buyers. [R.6. 643, 769][3]

B. JSC's Business Reasons for Relying on the Dealership System.

The jury in this case heard testimony from JSC's procurement manager, eight dealers, an expert in the timber procurement area, and a successful producer regarding the advantages of the dealership system for supplying a pulp and paper mill reliably and economically. Their testimony established that the dealership system is responsive to market conditions and avoids centralization of administrative and operational responsibilities, burdens, and costs.

Their testimony also established that, if JSC contracted directly with the 250 roundwood producers that currently haul pulpwood to JSC, rather than contracting with its current 35 to 40 roundwood dealers, JSC would have to hire (and pay) ten times the number of its current employees to perform the forestry, road-building, accounting, payroll, clerical, and administrative operations currently performed by dealers more efficiently and effectively than a paper company can with its own employees. [R.6. 431, 471-72, 580-82, 700-01, 723-24,

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[3] Littles' allegation that he must "pay" a commission to dealers who sell the wood he hauls to JSC is false. [Petition at 5 & n.4] In fact, dealers make their profits by paying producers less than the dealer receives from the wood buyer, similar to how profits are made any wholesale-retail arrangement, and producers do not "pay" money to dealers for the wood they haul under contract with the dealer. [R.5. 200-01]

765-769] Instead of spreading the cost of such operations among a number of dealers and the various paper companies to which those dealers sell wood, JSC would have to pay for all such operations for all producers hauling wood to JSC. JSC would have no more "middlemen" to assume responsibility for a steady supply of wood to the Mill from producers with varying degrees of reliability. JSC, rather than dealers, would have to maintain the numerous woodyards necessary to inventory wood for use when the flow of wood direct from the woods is inadequate due to bad weather or equipment failure. JSC, rather than dealers, would have to insure compliance by each such small producer with applicable Environmental Protection Agency, Alabama Department of Environmental Management, and other legal, insurance, and forestry standards, and demands for timely payment to producers and landowners. JSC, rather than dealers, would have to handle complaints from and defend lawsuits by landowners and others regarding the logging practices and operations of small producers. [R.6. 467-68, 471, 495-98, 717, 723-24, 767-70, 774-75, 839-40]

C. JSC Makes Supplier Contracts Only with Firms Already in Business as Dealers.

JSC does not make wood supplier contracts with businesses that are not already in business as dealers, nor does it enter into supplier contracts with persons who, like Littles, operate as producers. [R.5. 442; R.6. 463-64] Neither does JSC contract with any business that moves as little roundwood volume as Littles does. [R.6. 487-88]

JSC's business judgment to contract only with dealers has proven through the years to be well-founded. Many companies that have tried to operate without a dealership system have abandoned such attempts, have been forced to pay more for their wood supply, or have found it necessary to supplement their wood supply with wood purchased from wood dealers [R.5. 228-30; R.6. 724, 743-44, 769-70, 836-37].

D. JSC's Policy of Limiting Contracts to Suppliers Already in Business as Dealers Has an Equal Impact on Blacks and Whites.

In recent years, higher equipment and insurance costs, as well as the need for greater efficiency, have caused JSC to rely increasingly on dealers with larger operations and capacities. [R.5. 244-46; R.6. 475-76, 479-80, 775-76, 813, 815-17] JSC was able to reduce its own overhead costs by contracting more with larger dealers and, thus, reducing the number of dealers with which JSC did business. [R.6. 479-80]

Since the early 1980's, JSC's Brewton Woodlands Division has refused to enter into supplier contracts with at least 35 producers (only two of whom were black). [R.6. 483-87] Most of the producers who were refused contracts run larger operations than Littles does. [R.6. 487] In addition, the 23 white-owned companies already in business as dealers, with which JSC also refused to contract during the same time period, includes several companies that move over 2,000 cords of roundwood each week. [R.6. 485]

During that same time period, as a result of its consolidation of its supplier contracts with larger dealers, JSC terminated the contracts of approximately 45 roundwood dealers, all of which were white-owned businesses and were larger than Littles' business. [R.6. 482-83] As a result of JSC's policy of limiting its supplier contracts to larger dealers, the number of JSC's roundwood suppliers was reduced from 65 in 1984, to less than 40 by the time of trial. [R.6. 478-79]

When JSC was dealing directly with a larger number of businesses, JSC purchased wood chips from several chipmills owned by black persons. [R.6. 562-63] There are, however, no black persons currently in business as dealers in the Brewton area. [R.5. 189] At the time of trial, there were only two or three black producers in the Brewton area. [R.5. 227, 247]

E. Littles Is Not a Wood Dealer.

Littles is a producer, not a dealer. [R.5. 121, 230-31; R.6. 745-46] Littles asserted at trial, as he does in his Petition, that the dealer's role is only "nominal" with respect to the procurement and sale of the wood he produces, because Littles purchases his own timber resources rather than having a dealer perform the procurement function for him. [Petition at 5] The overwhelming evidence was to the contrary, and established the variety of other functions performed by the dealer, as well as the business economies inherent in JSC's dealership system, as described above. In any event, there was

no evidence that JSC has made or would make an exception to its "dealers only" policy for a white producer, even if that producer bought 100% of his pulpwood.

F. JSC's "Dealers Only" Policy Does Not Prevent Littles from Going into Business as a Dealer.

Littles' assertion that JSC "froze" dealer contracts in 1979 and now contracts only with businesses formed prior to that time is false. [Petition at 5-6] Instead, the evidence at trial established that JSC made thirteen new roundwood supplier contracts during the relevant statute of limitations period, some of which did not even exist prior to 1979. For example, the jury in this case heard testimony from the owner of Mobile Forest Products, a company that was established in 1984. The owners of Mobile Forest Products mortgaged everything they had in addition to raising $175,000 from an investor, and currently have $2.4 million invested in the company. [R.6. 811, 829-30]

Similarly, Littles' assertion that dealerships are usually acquired through inheritance within white families is false. [Petition at 6 & n.8] In fact, the jury in this case heard testimony regarding a variety of ways in which dealerships may be acquired or formed, including by expansion of logging operations like Littles'. [R.6. 546-48, 694-95, 721-22, 834-35] For example, Carter Pulpwood was purchased in 1968 for $20,000. [R.6. 674-75] Bracewell & Grant was purchased in 1964 for $25,000, with a subsequent purchase of woodyards for $100,000 in 1967. [R.6. 720-21] Branco Wood Products was purchased for about $100,000 in 1975. [R.6. 849] Littles' failure to establish,

buy, or expand into a dealer business is not JSC's responsibility. The simple fact is that, unlike the dealers who testified at trial, Littles has never risked the capital necessary to buy or start a dealership. [R.5. 250]

II. JSC HAS NOT CONTRACTED WITH ANY BUSINESS THAT IS SIMILARLY SITUATED TO LITTLES' BUSINESS.

Throughout this litigation and at trial, Littles identified Claude Alford as the best "comparator" in his efforts to prove that JSC made pulpwood purchase contracts with less qualified suppliers than himself. [R.1. #22 at 2, #40 at 2, #46 at 3-4; R.2. #69 at 11-12; R.5. 223-24, 307, 315-16] The undisputed evidence established, however, that during the period when he was still in business as a producer, Alford tried repeatedly and unsuccessfully to obtain a supplier contract from JSC. Like Littles, Alford was repeatedly refused a supplier contract. Then, in 1986, Alford bought Tri-State Timber Co., a dealership that already had a supplier contract with JSC, investing over $130,000 from profits from his logging business to finance the purchase. [R.6. 505-06, 508, 634, 636]

Tri-State's supplier contract with JSC was already at least two years old when Alford bought the company in 1986. [R.6. 501-04] At the time of Alford's purchase, Tri-State had an established annual wood flow of about $2.5 million worth of timber [R.6. 503], skilled foresters on the payroll [R.6. 638], supplier contracts with several pulp and paper companies [R.6. 62930], three longwood crews, several shortwood crews [R.6. 639], and two woodyards [R.5. 394-95].

Even before Alford's acquisition of Tri-State in 1986, Alford's operations and capacities as a producer were demonstrably superior to those of Littles. Alford's average weekly wood volume during the five years prior to his acquisition of Tri-State in 1989 was about three times what Littles was producing at that time. [R.6. 506-07; DX 21 & 22] Littles' gross receipts in 1986, when Alford acquired Tri-State, were less than half of Alford's. [R.5. 323-24; DX 31 & 32] Littles' equipment is old and in frequent need of repair, and was worth less than one tenth (1/10) of the value of Alford's equipment prior to his acquisition of Tri-State. [R.5. 294-95; DX 21 & 27] Furthermore, Alford's acquisition of Tri-State dramatically increased his production capacity. [R.6. 511-12]

Littles has only one logging crew of five to six employees [R.5. 240-41, 262], produces longwood, rather than shortwood [R.6. 517], and produces mostly pine, rather than hardwood [R.6. 498-99, 517]. His production averages 150 cords per week [R.5. 261-62, DX 15], about 90 cords of which is pulpwood [R.6. 516, DX 15]. Littles only operates locally in the Brewton area [R.5. 296], and has no business relationships with landowners in other areas of the state where hardwood primarily grows. [R.5. 300-01] Practical considerations of landowner relationships and transportation time and costs limit a producer's ability to produce outside a 30- to 50-mile radius of his base of operations. [R.5. 166, 295-01; R.6. 543-44, 668, 682, 845-46]

Furthermore, unlike typical dealers, Littles does not employ any professional foresters to take responsibility for pricing and purchasing wood on a full-time basis.

[R.5. 268, 402; R.6. 476] Littles' testimony at trial demonstrated that he is unfamiliar with the skills and tools used in "cruising timber" to estimate its value and submit competitive bids. [R.5. 268-71; R.6. 463] Littles is also unfamiliar with the Alabama Forestry Association's "Best Management Practices," which timber professionals must follow in Alabama for conservation and ecological reasons. [R.5. 276; R.6. 459, 474-75] Littles' liability insurance, without which he cannot operate as a producer, has been repeatedly canceled for non-payment of premiums, including on one occasion only a month before trial. [R.5. 335-40]

The jury in this case heard testimony from eight dealers with which to contrast Littles' qualifications. For example, Bracewell & Grant has 35 office employees and three foresters on its payroll. Its volume is from 1,500 to 1,900 cords per week. [R.6. 713-16] Southern Timber produces 2,000 cords per week using eight crews. [R.6. 738] Mobile Forest Products produces 6,000 cords per week using ten crews. [R.6. 811-12] Branco Wood Products produces 800 cords per week and maintains six months' timber inventory using three longwood crews and six shortwood crews. [R.6. 849-51]

The evidence established that all of the thirteen supplier contracts made by JSC during the statute of limitations period from October 1989 until the date of trial were with established dealers (rather than producers like Littles), which had qualifications and capabilities neither possessed nor even claimed by Littles. Each of those thirteen dealers had demonstrated ability to buy timber outside the Brewton area where there is a higher concentration of hardwood, and to deliver short hardwood by

rail or long hardwood to JSC's outlying woodyards for slashing. [R.6. 454-55. 488-99] All maintained timber inventory in their own woodyards. [R.6. 497-98] Each of these thirteen dealers has a total pulpwood volume much greater than Littles'. [R.6. 488-97, 591-97; DX 17-20 & 31]

Littles' volume is also much lower than the volume of many of the suppliers with which JSC has refused to contract. [R.6. 487] For example, the owner of Conecuh Timber Co. testified that he has a volume of 4,000 cords per week using ten crews, and that he has been turned down repeatedly for a JSC supplier contract. [R.6. 834-39]

As noted earlier, Littles wants to produce roundwood in the Brewton area. JSC has not made any contracts for the delivery of truckwood direct to the mill in Brewton, as Littles seeks to do, during any period relevant to this lawsuit. [R.6. 544] Nor has JSC made a contract for the delivery of primarily pine pulpwood, the species that Littles primarily produces because of his location. [R.6. 517, 545] None of the thirteen dealers that JSC added during the several years prior to trial is based within a 60-mile radius of Brewton, and JSC did not even consider any new dealers in the Brewton area. [R.6. 488, 546]

SUMMARY OF ARGUMENT

Littles' Petition for Certiorari is based on premises that falsely portray the facts and law at issue in this case. Specifically, Littles' characterization of JSC as a company that "froze" its contracts prior to 1979, intentionally excluded blacks from such contracts prior to 1979, and now only contracts with dealerships and the white heirs

of dealerships with which it contracted prior to 1979, is unrecognizable from the record. In fact, the evidence at trial established that JSC made new supplier contracts during the relevant time period with thirteen established dealerships. Each such dealership had capabilities that Littles does not have and does not even argue that he has. The evidence at trial also established that Littles has never risked the capital necessary to buy, start, or expand into the type of large, competitive dealership company with which JSC exclusively contracts.

Furthermore, Littles did not proffer any evidence whatsoever that would have been probative of "past intentional discrimination" by any corporate division of JSC in the making of wood supplier contracts or in any other respect. On the contrary, the uncontroverted evidence at trial affirmatively demonstrated that JSC's Brewton Woodlands Division contracted directly with black-owned businesses for the purchase of wood products prior to implementation of its policy of reducing the total number of its supplier contracts in the mid-1980's. Accordingly, Littles' challenge to the district court's holding that claims of "perpetuation of past discrimination" are not actionable under 42 U.S.C. §§ 1981 and 1982 is not only legally unfounded, it also raises issues that are not even presented by this case.

In addition, the "evidence" of "past discrimination" excluded by the district court consisted of Littles' proffer of (1) testimony alleging past discrimination by the Southern pulp and paper industry, in the form of an affidavit which did not even mention JSC, by a historian with no familiarity with JSC's contracting practices; (2) testimony by a black producer that a paper mill unrelated

to JSC had refused him a supplier contract; and (3) testimony regarding two dissimilar lawsuits brought by Littles' attorney against a separate division of JSC, both of which were settled with no admission of discrimination. The district court's exclusion of this "evidence" was properly based on considerations of relevance, prejudice, undue delay, waste of time, and the potential for jury confusion.

Finally, the law applied by the district court and the Eleventh Circuit in this case does not present any conflict with the decisions of this Court or of other federal circuits, or any question of federal law that has not been settled by this Court. Instead, Littles' arguments in this respect are based on comparisons of false characterizations of the holdings below with cases addressing questions that are not at issue in this appeal, and on citations to voting rights and school desegregation cases decided under Constitutional standards that are not applicable to this case under 42 U.S.C. §§ 1981 and 1982.

ARGUMENT

I. THE DECISIONS BELOW WERE CONSISTENT WITH AND COMPELLED BY APPLICABLE LAW.

In Section I of his Argument, Littles cites various historical and statistical sources regarding the importance of the timber industry to the Southern economy. [Petition at 9-15] Based on these citations Littles argues that the timber industry is "significant," but does not (and cannot) identify any *legal* issue raised by this case that is

"significant," as appropriate to warrant review by this Court.

Indeed, Littles' Petition does not even address the law that is applicable to this case under 42 U.S.C. §§ 1981 and 1982, as set out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992); *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989); *Crawford v. Western Electric Co.*, 745 F.2d 1373, 1376 (11th Cir. 1984); *accord Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563 (7th Cir. 1989); *Meyers v. Ford Motor Co.*, 659 F.2d 91 (8th Cir. 1981); *Houston v. Benttree, Ltd.*, 637 F.2d 739 (10th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981). Under these cases, a plaintiff is required to prove *intentional* discrimination to prevail in an action under 42 U.S.C. §§ 1981 and 1982. *See also General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

A. Littles Failed Even to Establish a Prima Facie Case of Intentional Discrimination.

Littles is not a wood dealer. Instead, Littles' only business is and always has been as a "producer." The only dealers that JSC contracted with during the relevant period prior to this action were large, established dealerships with particular qualifications and capabilities that met specific needs of JSC in terms of species of product, location outside of the Brewton area, and/or mode of delivery. The undisputed evidence established that Littles had *none* of these qualifications. Accordingly, Littles did

not meet even the minimum qualifications for a contract with JSC, and Littles failed to establish even a prima facie case of discrimination. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989); *Zaklama v. Mount Sinai Medical Center*, 842 F.2d 291, 293 (11th Cir. 1988)), *cert. denied*, 502 U.S. 1058 (1992).

B. JSC's Standards for the Selection of Its Wood Dealers Are Legitimate and Nondiscriminatory.

Even if Littles had been able to establish a prima facie case, JSC established legitimate nondiscriminatory reasons for its decision not to contract with him. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981); *Brown*, 939 F.2d at 949. The evidence was overwhelming that JSC's policy of contracting only with dealers and for not contracting with Littles (even if he had been in business as a dealer) was both rational and nondiscriminatory.

C. JSC's Reasons For Not Contracting with Littles Are Not Pretexts For Discrimination.

As demonstrated by the evidence at trial and described above, a comparison of Littles' qualifications with those of the dealers with which JSC contracts does not support Littles' claims of pretext. In particular, Littles alleged throughout the pre-trial proceedings and at the trial of this matter that Claude Alford, the owner of Tri-State Timber Co., is the dealer most comparable to Littles.

As established by the evidence at trial, however, any similarity between Littles' operations and Alford's ends with the facts that they both work in the timber industry and that, before Alford acquired an existing dealership business, both were denied supplier contracts by JSC.

Furthermore, the equal impact of JSC's policies on whites precludes a finding of pretext. JSC's selection criteria have resulted in refusals of supplier contracts to at least 58 white-owned businesses and only 2 black-owned businesses. In addition, JSC *terminated* 45 roundwood dealerships from 1984 to 1991, and the total number of roundwood dealerships declined from 65 to only 40. Most of these terminated dealerships had qualifications superior to those of Littles, and *all* were white-owned businesses. "It is difficult to hold that a practice which affects applicants of all races in the same manner is actually designed to conceal a racially discriminatory motive." *Brown*, 939 F.2d at 952 (citing *Giles v. Ireland*, 742 F.2d 1366, 1375-76 (11th Cir. 1984) (hiring criteria which affect both blacks and whites equally are not discriminatory); *Cannon v. Teamsters & Chauffeurs Union*, 667 F.2d 173, 176-77 (7th Cir. 1981) (same)).

II. THE ELEVENTH CIRCUIT'S DECISION RAISES NO ISSUE THAT WARRANTS REVIEW BY THIS COURT.

A. Littles Did Not Proffer Any Evidence of Historical Discrimination by JSC in the Making of Supplier Contracts.

Littles asserts that the courts below never addressed his contention that JSC had "an intentionally discriminatory policy of selecting only whites as dealers" prior to

1979. [Petition at 6] Based on this assertion, Littles makes the ludicrous argument (without citation to authority) that his contention of such a past policy of discrimination "must be assumed to be true" for the purposes of his Petition for Certiorari. [*Id.*] In fact, the reason the courts below never addressed this allegation was because Littles never proffered any evidence to support it.

Indeed, the only evidence on the issue of JSC's historical contracting practices demonstrated that prior to the 1980's, when JSC was dealing directly with a larger number of wood suppliers, JSC contracted directly with several black businessmen for the purchase of wood products. [R.6. 562-63] Accordingly, not only was there no evidence that JSC had "a past policy of discrimination," the uncontroverted evidence affirmatively demonstrated that JSC did *not* have an intentionally discriminatory policy or practice with respect to its supplier contracts.

Thus, the factual linchpin upon which all of Littles' arguments in his Petition depends simply does not exist. Since Littles never proffered any evidence whatsoever that JSC had a past policy of discrimination with respect to its supplier contracts, Littles' arguments that the trial court erroneously excluded such evidence, that JSC has an affirmative obligation to eliminate the effects of such a past policy, and that such a past policy warrants ignoring the fact that Littles is utterly unqualified for a supplier contract with JSC, raise issues that are not presented by the facts of this case, in addition to being legally unfounded.

B. Littles' New Argument That JSC Relies on a "Grandfather Clause" Is Not Supported by the Evidence Presented or Proffered at Trial.

Littles argues in his Petition that JSC's "dealers only" policy since the mid-1980's amounted to a "freeze" imposed by JSC on new supplier contracts "at some point prior to 1979." [Petition at 5-6] Based on this new and unsupported allegation, Littles argues that JSC's dealership system "assures with almost mathematical precision" that blacks "will never even be considered for one of its dealer contracts." [*Id.* at 12 & 14]

This is the first time in this lawsuit that Littles has relied on this characterization of JSC's dealer-selection policies. Giving Petitioner the benefit of the doubt, this new characterization, made for the first time to this Court, appears to be based on a misapprehension by Littles' new counsel of the testimony at trial. [*See id.* at 5-6 (citing "Tr. 442, 464, 578")] At the cited pages, JSC's wood procurement manager testified that JSC has a policy of contracting only with companies *in business as* wood dealers. There is *no* evidence that JSC has ever had a policy of restricting its contracts to companies that had a contract with JSC or another pulp and paper company prior to 1979. In fact, the uncontroverted evidence at trial demonstrated that JSC entered into thirteen new supplier contracts during the relevant statute of limitations period, including with companies that were not even established until after 1979.

Accordingly, Littles' argument that the JSC's "dealers only" policy amounts to an "infamous grandfather clause" of the type addressed in inapplicable voting

rights cases decided by this Court in 1915, *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915), is entirely without factual foundation in the record in this case. [*See* Petition at 12, 20-21 & n.40]

C. The Settlements of Employment Discrimination Lawsuits Against Separate Corporate Divisions of JSC Are Irrelevant to Littles' Claim of Contractual Discrimination by JSC's Woodlands Division.

As noted above, Littles offered no evidence to controvert the fact that JSC's Woodlands Division has never had a policy of excluding blacks from consideration for a supplier contract and has contracted with black-owned businesses for the supply of wood products. Instead, Littles proffered evidence at trial regarding two lawsuits previously brought by Littles' attorney against a separate corporate division of JSC, both of which were settled without any admission of discrimination by JSC. [Petition at 13 & n.27] *See Harrison v. Container Corp. of America*, Civ. No. 90-T-016-N (M.D. Ala. 1990); *Suggs v. Container Corp. of America*, Civ. No. 7058-72-P (S.D. Ala. 1974). The *Suggs* case relied on a disparate impact theory to challenge JSC's seniority system at its Brewton Mill.[4] The *Harrison* case also was a Title VII employment discrimination case, and challenged promotion practices at the Mill.

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[4] Significantly, the disparate impact theory relied on by the plaintiffs in the *Suggs* case was specifically rejected by this Court four years after the settlement. *See Teamsters v. United States*, 431 U.S. 324 (1977).

The central issue in this case is whether JSC's Woodlands Division intentionally discriminated against Littles in declining to make a wood supplier contract with him. Accordingly, the trial court concluded that evidence of unproven claims resolved in the *Suggs* and *Harrison* settlements would inject issues relevant to unintentional employment discrimination (including "disparate impact" theory) that are not relevant in this case alleging intentional contract discrimination, relative to persons not involved in this case, against a separate corporate division of JSC, and with regard to alleged discriminatory actions that are dissimilar to those alleged in this case, and would confuse the issues and mislead the jury. *See Fed. R. Evid.* 403 (relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

In addition, evidence of unproven *claims* of employment discrimination asserted and resolved the *Suggs* and *Harrison* lawsuits against the *Brewton Mill* would not make Littles' allegation in this case that he was discriminated against by the *Woodlands Division* in the making of supplier contracts any more or less probable. Accordingly, such evidence was irrelevant and inadmissible. *Fed. R. Evid.* 401; *cf. Fed. R. Evid.* 408 (evidence regarding settlement is not admissible to prove liability for the claims settled). Accordingly, the district court excluded evidence regarding the existence and settlement of both cases, but allowed limited testimony regarding the employment practices at the Mill that were contemporaneous with Littles' solicitations of a supplier contract with the Woodlands Division. [App. at 31a-32a]

The district court also excluded evidence regarding employment practices by JSC in its separate Mill division in the 1960's. [App. at 32a] In particular, Littles proffered testimony by a Mill employee that no blacks worked in certain Mill departments in 1966. [R.5. 87-88] This proffered testimony of alleged employment discrimination in job assignment by a separate corporate division of JSC addressed conditions that were conclusively remedied by a settlement that Littles' attorney agreed to twenty years ago. The class action consent decree in the *Suggs* case specifically provided that "[c]ompliance with this Decree shall be deemed compliance with Title VII and 42 U.S.C. § 1981 with respect to said individuals and said class." *Cf. Hazelwood School District v. United States*, 433 U.S. 299, 309-10 n.15 (1977) ("[Evidence of historical discrimination] might in some circumstances support the inference that such discrimination continued, *particularly where relevant aspects of the decision-making process had undergone little change.*") (emphasis added); *accord Bazemore v. Friday*, 478 U.S. 385, 402 (1986).

In addition, allowing such evidence would have potentially prejudiced the jury and would have delayed the trial and wasted the district court's time by forcing JSC to respond with lengthy rebuttal evidence just as though it were trying allegations of discrimination that, if they ever had any foundation at all, have long since been resolved. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) (the purpose of limitations periods is to "protect employers from the burden of defending claims arising from employment decisions that are long past"); *Harpring v. Continental Oil Co.*, 628 F.2d 406 (5th Cir. 1980) (district court properly excluded relevant testimony

where evidence "would involve trying another lawsuit within the existing lawsuit"), *cert. denied*, 454 U.S. 819 (1981).

D. The District Court's Rulings With Respect to Littles' "Evidence" of Discrimination in the Pulp and Paper Industry as a Whole Were Within the Court's Discretion.

Littles also relies in his Petition on cases alleging unintentional "disparate impact" discrimination in employment that were filed in the 1960's and 1970's against pulp and paper companies other than JSC. [Petition at 13 & n.25] "Evidence" regarding the cases cited by Littles was not proffered at trial, and, obviously, would properly have been excluded on grounds of relevance had it been offered.

The "evidence" of "past discrimination" by the pulp and paper industry as a whole that was proffered by Littles at trial consisted of (1) expert testimony regarding "historical" discrimination by the Southern pulp and paper industry that did not even mention JSC as a participant in such discrimination or otherwise [App. at 32a-33a; R.2. 66; R.5. 9-11, 279-89; R.6. 804; CX 1], and (2) testimony by a black producer that a paper mill unrelated to JSC had refused him a supplier contract [R.6. 747-48]. Again, Littles proffered no evidence whatsoever to rebut the fact that JSC had contracted with black-owned businesses for the supply of wood products prior to implementation of its policy of contracting with a fewer number of larger dealers. This evidence affirmatively

demonstrated that JSC did *not* have a history of discrimination with respect to its supplier contracts.

The district court's exclusion of Littles' proffered "evidence" was properly based on considerations of relevance, prejudice, undue delay, waste of time, and the potential for jury confusion. [App. at 32a-33a; R.6. 747-48] The confusion and waste of judicial time and resources inherent in the presentation of evidence regarding Littles' allegations against the entire pulp and paper industry, in the context of this lawsuit alleging intentional discrimination by JSC's Woodlands Division, are apparent. Even the strongest possible evidence of discrimination by other companies would not be probative of discrimination by JSC, and would have tended to confuse and mislead the jury into thinking it could find intentional discrimination by JSC based on even unintentional discrimination by another company.

E. This Case Presents No Conflict with Decisions of this Court or of Other Circuits.

Littles argues that the district court erred in holding that his allegation of JSC's "knowing perpetuation of past discrimination" failed to state a claim under §§ 1981 or 1982, and that this holding was "flatly inconsistent with reported decisions of this Court and of the other courts of appeal." [Petition at 7 & 16] On the contrary, the precedent is well established that Littles' "knowing perpetuation" claim is a "disparate impact" claim that is not actionable under 42 U.S.C. §§ 1981 and 1982. *E.g., General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375 (1982) (plaintiff must prove intentional discrimination to

establish a violation of § 1981); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 953 (11th Cir. 1991) ("[I]t is not sufficient to show that the defendant was aware that the particular practice would have a discriminatory impact. Instead, *the plaintiff must show that the defendant chose the policy for precisely this purpose.*" (emphasis added); citing *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988)), *cert. denied*, 502 U.S. 1058 (1992). *Compare Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("disparate impact" model of proof addresses practices challenged under Title VII that are "neutral on their face, and even neutral in terms of *intent*," but that have the incidental effect of disadvantaging blacks to a greater degree than whites) (emphasis added), *with McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("disparate treatment" model of proof addresses *intentional* discrimination).

Littles attempts to circumvent these well-settled principles with a convoluted interpretation of *Bazemore v. Friday*, 478 U.S. 385 (1986), and the district court's analysis of that decision in this case. [Petition at 16-17] Contrary to Littles' mischaracterization, the district court did not state that Littles' claims would be compelling if *Bazemore* were applicable. [*Id.* at 16 (citing App. 26a)] Instead, the district court stated at the cited page that Littles' claims would be more compelling if this were a disparate impact case, without citation to *Bazemore*.

Littles also describes several decisions of various circuit courts of appeals that have followed *Bazemore* as "flatly inconsistent with" the lower courts' decisions in this matter. [Petition at 17-19 & nn.28-39] Each of the cited cases involves the "continuing violation" theory

that has been developed, based on *Bazemore*, to address statute-of-limitations defenses in discrimination cases and to allow consideration of otherwise time-barred evidence in cases where the "continuing violations" theory applies. *Bazemore*'s "continuing violation" theory is not at issue in this appeal. On the contrary, the jury in this case found in favor of Littles with respect to JSC's statute-of-limitations defense. [App. at 42a]

Furthermore, the cases cited by Littles are entirely consistent with Eleventh Circuit law. Like the cases cited by Littles as "flatly inconsistent," the Eleventh Circuit applies the "continuing violation" theory both in cases alleging unintentional and intentional discrimination. *Compare, e.g., Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796-97 (11th Cir. 1992) (applying "continuing violation" theory in disparate impact case), *with Mitchell v. Jefferson County Board of Education*, 936 F.2d 539, 548 (11th Cir. 1991) (applying "continuing violation" theory in Equal Pay Act case alleging intentional discrimination). Indeed, one of the decisions cited by Littles as "flatly inconsistent with" Eleventh Circuit law has been specifically *followed* by the Eleventh Circuit. *See Beavers*, 975 F.2d at 796 (following *Webb v. Indiana National Bank*, 931 F.2d 434, 438 (7th Cir. 1991)). [*See* Petition at 17-18 & nn.30 & 33] Accordingly, Littles' purported conflict among the circuits is not only irrelevant, it is non-existent.

In any event and as noted above, the only "evidence" proffered by Littles of "past discrimination" that JSC allegedly "knowingly perpetuated" consisted of vague testimony regarding discrimination in the pulp and paper

industry *other than* by JSC's Woodlands Division. In contrast, the evidence offered in *Bazemore* related to discrimination by the *same* employer at issue. Accordingly, Littles' garbled characterization of *Bazemore* would not make Littles' proffered "evidence" admissible or his legal arguments defensible, even if that characterization were accurate.

F. The Fourteenth and Fifteenth Amendment Cases Cited by Littles Are Irrelevant to this Lawsuit.

Instead of discussing the many cases decided under 42 U.S.C. §§ 1981 or 1982, which are dispositive of this case, Littles cites a number of school desegregation and voting rights cases that arise under the fourteenth and fifteenth amendments. [Petition at 19-20] The analyses applicable to suits alleging such invidious, unconstitutional, state-sponsored violations of civil rights are completely different from those applicable to suits alleging violations of §§ 1981 and 1982 by private businesses.

Specifically, "qualifications" are not relevant in the school desegregation and voting rights cases cited by Littles. Individuals are "fungible" for the purposes of determining whether they have a constitutional right to vote or to receive an education. In cases such as this, however, it cannot be assumed "that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded." *Mayor v. Educational Equality League*, 415 U.S. 605, 620 (1974). "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than

to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *City of Richmond v. Croson*, 488 U.S. 469, 501-02 (1989) (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977)); *see also Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553 (11th Cir. 1994). Given that no blacks in the Brewton area are even in business as wood dealers, let alone "qualified" under JSC's standards, the constitutional standards relied on by Littles would not affect the outcome of this case, even if such standards were applicable.

CONCLUSION

Littles' Petition does not and cannot identify any issue that would warrant review by this Court. Instead, Littles cites inapplicable cases and fabricates a controversy among the circuit courts of appeal that does not exist and would not be presented by this case even if it did exist. Accordingly, Littles' arguments in his Petition to this Court are no less frivolous than the Eleventh Circuit found Littles' arguments to be in the proceedings below.

For all the foregoing reasons, Respondent Jefferson Smurfit Corporation (U.S.) respectfully requests this Court to deny Herbert Littles' Petition for Certiorari.

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